72-494

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-494

ANIELLO DELLA CROCE,

Petitioner,

vs.

STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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ANIELLO DELLA CROCE,

Petitioner,

vs.

STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

The petitioner, ANIELLO DELLA CROCE, prays that a writ of certiorari issue to review the judgment of the Appellate Division, First Department, of the Supreme Court of New York, rendered in these proceedings on April 20, 1972.

Opinions Below

The trial of the petitioner took place in the Supreme Court of New York County before a jury. No opinion was rendered by the trial court.

The conviction was affirmed by the Appellate Division, First Department of the Supreme Court of the State of New York without opinion, on April 20, 1972. The Appellate Division decision is reported at A.D.2d , 331 N.Y.S.2d 591, and is reproduced in an appendix to this brief (A-2, *infra*).

The New York Court of Appeals denied leave to appeal, without opinion, on May 24, 1972. The Court of Appeals order is not yet reported, but a copy of it is reproduced in an appendix to this brief (A-1, *infra*).

Jurisdiction

The petitioner was tried and convicted for criminal contempt in violation of § 215.50 of the New York Penal Law in the Supreme Court of New York County and on September 8, 1971, was sentenced to one year in prison.

On April 20, 1972 the Appellate Division, First Department affirmed the judgment of conviction without opinion and the New York Court of Appeals, on May 24, 1972, denied leave to appeal without opinion.

On August 25, 1972 the Honorable Thurgood Marshall signed an order extending the time for filing this petition to and including September 25, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

1. Whether the petitioner was denied a fair trial by the manner in which the Court interrogated the jurors, who had read a highly inflammatory *Daily News* article?

Constitutional and Statutory Provisions Involved Conclusion

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

New York Penal Law, § 215.50(4), Criminal Contempt:

> A person is guilty of criminal contempt when he engages in any of the following conduct:
>
> * * *
>
> 4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory;

Statement of the Case

On March 11, 1971 the petitioner was tried before a jury in the Supreme Court of New York County on 20 counts of criminal contempt in violation of § 215.50(4) of the New York Penal Law. The indictment alleged the petitioner was contemptuous because his answers were evasive and nonresponsive.

On March 21, 1971, during the course of the trial, an article appeared in the *Daily News* containing petitioner's picture and describing him as a participant in a bloody gang war which was then raging in New York.* The article grimly describes the death of two men, as casualties of that war, who had ". . . been tortured, stabbed dozens of times, gagged, shot in the head with the same gun, and wrapped in pink blankets." The article linked the petitioner to these grizzly murders.

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* Annexed to this petition as Appendix B is a reproduction of that article in its entirety (B-1, *infra*).

Defense counsel, stunned by this article, immediately advised the Court of its appearance and asked that each of the jurors be privately interrogated to determine whether they had read the article and whether they would be influenced by it (485,489).* The Assistant District Attorney prosecuting the case agreed to that procedure (486).**

Despite the agreement between counsel concerning the proper manner of examining the jurors, the court decided to interrogate them collectively (494-499). Six of the jurors admitted that they had read the article (495). However, the court refused to examine each of those six jurors separately and privately, but questioned them in the presence of the others (494-499). Defense counsel complained vigorously of this procedure and moved for a mistrial (505).

The jurors reported they would not be influenced by the article and the court, subsequently in its charge, instructed them to disregard the article (502, 717).

At the end of the case the court dismissed 15 counts of criminal contempt as a matter of law and submitted the five remaining counts to the jury. The jury found the defendant guilty on each of those counts, and on September 8, 1971 he was sentenced to one year on each of those counts, the sentences to run concurrently. The petitioner is presently serving that sentence.

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* Numbers in parentheses refer to pages in the record on appeal in the Appellate Division, New York Supreme Court.

** When defense counsel requested the court to examine the jurors privately, the prosecutor expressed his opinion that such a procedure would be too costly in terms of time (490).

REASONS FOR GRANTING THE WRIT

I. The Petitioner was denied a fair trial by the manner in which the Court interrogated the jurors who had read a highly inflammatory Daily News article.

The judgment below involves a critical issue in the administration of criminal justice in the States which demands consideration by this Court. This crucial question involves the need for appropriate procedures in measuring the influence upon jurors of a highly inflammatory newspaper article in a criminal case.

Over a decade ago this Court embarked upon a campaign of widespread reform of criminal procedures in both federal and state courts. The vehicle used to achieve this reformation was the Due Process Clause of the Fourteenth Amendment. One of the areas remodeled as a result of this cleaning-up campaign, which was badly in need of improvement, was the regulation of procedures governing prejudicial publicity in criminal cases.* However, this case, better than any other, illustrates that there is still more work to be done.

The problem of accommodating a free press, while assuring fair trials for criminal defendants, has received continuing attention from the American Bar Association's Special Committee on Standards for the Administration of Criminal Justice.**

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* *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Rideau* v. *Louisianna*, 373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Marshall* v. *United States*, 360 U.S. 310 (1959); *United States* v. *Palmieri*, 456 F.2d 9 (2d Cir. 1972); *United States* v. *Rubino*, 431 F.2d 284 (6th Cir. 1970); *United States* v. *McKinney*, 429 F.2d 1019 (5th Cir. 1970).

** American Bar Association's Standards, Fair Trial and Free Press; American Bar Association's Standards, Code of Judicial Conduct, §§ 3.7 and 5.2, NYLJ, August 23, 1972, p. 4, col. 3, 4; American Bar Association's Code of Professional Responsibility, Disciplinary Rule 7-107.

No one would doubt or deny the anguishing impact the *Daily News* article must have upon petitioner's jurors. The terrifying description of the murder of two men linked to the petitioner and the article's vivid account of the bloody gang war raging in New York City was absolutely devastating. It is impossible to imagine how any juror's neutrality could survive in the face of this harrowing publicity. This is particularly so when half the jury admitted reading the article.

In the context of the dreadful publicity in which petitioner's trial took place, it was of the utmost importance for the court to allow the defense the greatest latitude in probing the reactions of the jurors exposed to this appalling publicity in order to discover the extent of its influence upon them. Instead, the court took over this function and sabotaged the well-meaning efforts by defense counsel to effectively measure the extent of the damage to the jurors' impartiality caused by this article. Such limitation of jury interrogation rendered the examination useless as an implement of discovery. It served only to allow the jurors self-serving declarations of impartiality to obscure the manifest prejudice demonstrated by the record.

This Court, as far back as 1959, in *Marshall* v. *United States*, 360 U.S. 310 (1959), in an enormously influential decision, acknowledged the strong probability that prejudicial publicity would interfere with a defendant's receiving a fair trial in a criminal case. There a newspaper article disclosed the defendant's prior criminal record, evidence certainly not admissible in the trial. The trial court examined each juror individually in chambers and discovered that seven jurors had seen the article. There, as here, each of the seven jurors told the trial judge that he would not be influenced by the news article, that he could

decide the case on the evidence, and that he was not prejudiced against the petitioner. Consequently, the court denied the defense's motion for a mistrial.

Nevertheless, this Court reversed the petitioner's conviction and ordered a new trial, declaring:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. . . .It may indeed be greater for it is then not tempered by protective procedures." (360 U. S. at 312-313)

The similarity between *Marshall* and our case is astonishing—the only significant difference being that here the trial court refused to examine the jurors individually in chambers to determine the extent of the damage done to their impartiality by the *Daily News* article. Instead, the trial court below committed the unpardonable error of conducting the examination of the jurors collectively in open court.

Other courts have carefully followed this Court's ruling in *Marshall* and have required that jurors subjected to adverse publicity be examined individually and privately. *United States* v. *Palmieri*, 456 F.2d 9 (2d Cir. 1972); *United States* v. *Rubino*, 431 F.2d 284 (6th Cir. 1970); *United States* v. *McKinney*, 429 F.2d 1019 (5th Cir. 1970); *United States* v. *Milanovich*, 303 F.2d 626 (4th Cir. 1962); *United States* v. *Margoles*, 407 F.2d 727 (7th Cir. 1967); *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962).

The rationale of these cases is invulnerable and should be applied to the states under the authority of the Due Process Clause of the Fourteenth Amendment.

The American Bar Association has fixed standards requiring a judge to interrogate jurors subjected to scathing publicity which occurs during the course of a criminal trial in the very manner requested by defense counsel in the court below.*

For that matter, the American Bar Association's Advisory Committee on Fair Trial and Free Press, after extensive research, found that adverse publicity which occurs *during* a trial, as in this case, is even more damaging than extensive pretrial publicity.**

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* American Bar Association Standards, Fair Trial and Free Press, § 3.5(f) states:

"(f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.

If it is determined that material disseminated during the trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The method of examination shall be the same as that recommended in section 3.4(a) above. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if the material in question would furnish grounds for a mistrial if referred to in the trial itself."

** The Committee wrote:

"The Committee's content analysis indicates that the occasions on which potentially prejudicial material appears are considerably smaller in number during the trial than before. This is, in part, due to the number of cases disposed of without trial as well as to the fact that trials appear to be considered less newsworthy than arrests. The decline in frequency, however, may be more than matched by the increase in hazards. Information reported well in advance of trial may be forgotten; information appearing during the trial seems far more likely to remain in the mind of the trier of fact if he is exposed to it. Further, he may be more inclined to seek out this information when he is personally involved in the case." (Fair Trial and Free Press, Tentative Draft [1966], at 40.)

Experience has taught us and common sense dictates that jurors are reluctant to say publicly what they might admit privately. The examination of jurors in the presence of each other is inhibiting. Each juror feels a compulsion to publicly declare that he has *not* been influenced by adverse publicity and therefore is able to do his duty as a juror. Whereas in the privacy of a judge's chambers, where defense counsel and the prosecutor may participate in the investigation, facts can be developed which will clearly show influence and the loss of impartiality.

The other danger inherent in the procedure used below involves the likelihood that one juror's comments concerning his awareness of prejudicial news publicity will inevitably infect the impartiality of another juror unaware of those facts.

The reasons for this two-fold rule is best stated in *Coppedge* v. *United States*, 272 F.2d 504 (D.C.Cir.1959):

> "The inquiry made of the jurors by the court concerning their reading of the newspaper articles was not adequate for the protection of the defendant. The court knew which of the regular jurors had read the newspaper articles. No individual inquiry was addressed to these persons as to the possible influence of the articles upon each of them. Only a general and very brief inquiry was made of the jury as a whole. . . . It is too much to expect of human nature that a juror would volunteer in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial. Not only so, but had one or more of them said they would be so influenced, and especially if they had then explained why, the damage to defendant would have been spread to the listening other jurors. In view of the nature of the articles the court should have made a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles." (272 F.2d at 507-508)

This case presents the Court with a singular opportunity to fill in the detail, broadly sketched in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), of the constitutional requirements of a trial judge's responsibility toward the accused in notorious and highly publicized criminal trials. The problem presented here is far more difficult than pretrial publicity because there can be no change of venue. Consequently, precise rules are all the more needed in order to afford defendants due process of law.

Other courts have adopted the fair trial and free press rules which are generally in harmony with the American Bar Association Standards discussed above. See, *e.g.*, *United States* v. *Dickinson*, F.2d , 11 Cr.L. 2510 (5th Cir., August 22, 1972); *United States* v. *Garrison*, F. Supp. , 11 Cr.L. 2433 (E.D. La., July 24, 1972); *cf. Stapleton* v. *District Court*, Colo. , 11 Cr.L. 2502 (Colo. Sup.Ct., August 1972).

The ABA standards have been implemented by so many courts across the nation because they are premised upon substantial investigation and research.*

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* The ABA Advisory Committee has rejected the presumption that jurors, having taken an oath to be impartial and when carefully instructed by the courts, are capable of adhering to their obligation despite the influence of extrajudicial publicity of matters inadmissible in the courtroom. The Committee, after painstaking research, determined that:

> "The relevance of these data need not be labored, but two points should be emphasized. First, the processes by which beliefs are formed and adhered to, and their effect on perception, appear to take place to a large extent below the level of consciousness. Thus a juror's good faith efforts to lay these beliefs aside cannot be determinative. Second, even exposure to *accurate* information can cause difficulty, because unless it is complete in every respect, with all the necessary nuances and shadings, it seems likely to instill a belief that will be hard to shake and that will color the jurors' perception of the evidence adduced in court." (Tentative Draft, at 64; footnotes omitted.)

(Footnote continued on following page)

It is imperative that procedures be established which are constitutionally adequate in assessing the effect of rabid publicity in a criminal trial. Without such constitutionally adequate measures, no defendant in a criminal trial is safe.

It is hard to imagine more damaging publicity than that which was inflicted upon the jurors in this case. The court's interrogation of the jurors was woefully inadequate under the circumstances. The record here amply demonstrates the trial court's total abandonment of its responsibility to protect the accused against the harmful pressures from this appalling newspaper publicity. These disgraceful failures of due process cannot be ignored by this Court, particularly when great pains were taken in *Sheppard* v. *Maxwell, supra,* to instruct trial courts about procedures which should be taken to guard against the impact of inflammatory news coverage of a criminal trial.

The guidelines fixed by this Court in *Sheppard* are directly relevant here. Particularly important is this Court's admonition that where publicity during the trial infects a nonsequestered jury, a new trial should be ordered. (384 U.S. 333, at 363.) The same rule should apply here. Although in *Sheppard* the Court was primarily concerned with news media coverage of the actual trial itself, here the *Daily News* article was not intended to be a report of the proceedings of the trial. Thus the harm here was all the more severe and inexcusable. Surely the important policy pronouncements housed in the *Sheppard* and *Marshall* decisions should not be allowed to

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(Footnote continued from preceding page)

The Committee concluded further:

> "The Committee believes, on the basis of all this evidence, as well as the natural inferences dictated by judgment and experience, that there is indeed a substantial danger of an unfair trial when potentially prejudicial information reaches the eyes or ears of the trier of fact." (Tentative Draft, at 66.)

be depreciated. They must, of constitutional necessity, be reinforced if justice is to be done in our criminal courts.

The prejudice suffered by the petitioner here was not cured by the trial court's feeble efforts to learn if the jurors would be influenced by the *Daily News* article. The court asked the 12 jurors assembled in the jury box if they had read the article. This procedure flew in the face of that suggested by defense counsel of examining the jurors privately. When the six responded that they had read the article, the court merely asked the six jurors in open court if the article they read would affect their judgment (494-499). Naturally, each responded in a perfunctory manner that they would be uninfluenced by the article (494-499). Under such circumstances, the complete abdication of the trial court's responsibility to protect the impartiality of the tribunal charged with the responsibility of trying the petitioner is manifest. And in its charge, the trial court only advised the jury to disregard the *Daily News* article.

Experience has taught us that such an instruction regarding highly inflammatory evidence is totally ineffective. For example, in *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court concluded that such instructions were inadequate to quarantine the harm caused by the co-defendant's confession which inculpated another defendant. Thus it would be a serious insult to the scholarship of this Court to suggest that the same form of instruction could cure the catastrophic impact of this shocking news article For just as in *Bruton*, the damage done to this petitioner could not be undone by any court's instructions.

It is further urged that under the Due Process Clause of the Fourteenth Amendment, when a jury has been exposed to prejudicial extrajudicial information, there is a presumption of prejudice which must be rebutted, if possible, by the

prosecution. This constitutional rule has been uniformly applied in the federal courts and is of federal Due Process proportions.*

Here, where the extrajudicial information consists of such a staggering account read by six jurors, a mistrial is mandated unless the prosecution is able to demonstrate affirmatively that the defendant was not prejudiced. In *Wood* v. *Georgia*, 370 U.S. 375 (1962), Mr. Justice Harlan noted in his dissenting opinion:

> "In such cases, [where prejudicial 'outside' statements reach a trial jury] although the question is whether the rights of the accused have been infringed rather than whether there has been a clear and present danger of their infringement, it is necessary only to show a substantial likelihood that the verdict was affected, and it is no answer that each juror expresses his belief that he remains able to be fair and impartial." (370 U.S. at 400)

And, in *United States* v. *Kum Seng Seo*, 300 F.2d 623 (2d Cir. 1962), one juror revealed to the other jurors a newspaper clipping which summarized the events of the case, including the high bail set by the court and the defendant's incarceration in default of bail. When this was brought to the court's attention, the trial court examined two of the jurors and concluded that the defendant had not been prejudiced. However, the Court of Appeals reversed because the jurors had before them matters which were not in evidence. The same is true in our case. The *Daily News* article read by six of the jurors suggested the peti-

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* *Marshall* v. *United States*, 360 U.S. 310 (1959); *Young* v. *United States*, 346 F.2d 793 (D.C. Cir. 1965); *Schoeneman* v. *United States*, 317 F.2d 173 (D.C. Cir. 1963); *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962); *Coppedge* v. *United States*, 272 F.2d 504 (D.C. Cir. 1959); *Carter* v. *United States*, 252 F.2d 608 (D.C. Cir. 1958); *Krogmann* v. *United States*, 225 F.2d 220 (6th Cir. 1953); *Marson* v. *United States*, 203 F.2d 904 (6th Cir. 1953).

tioner's connection with two atrocious murders and characterized him as a leading combatant in the underworld war for control of the "Fish Market rackets." Surely the incendiary nature of this article read by six jurors must have adversely affected their verdict, requiring an automatic reversal of the petitioners conviction.

Conclusion

Today, more than any other time in our history, it is impossible for anyone to escape the impact of the omnipresent news media. Every man, woman and child is bombarded by news stories from radios, TV sets and the pages of newspapers. Thus, there is no way jurors can hide from such overwhelming news coverage in notorious cases. Consequently, when our courts are called upon to perform open heart surgery on the hulking body of American justice, because of the high incidence of scandalous publicity in criminal trials, it must be carefully conducted. The procedures suggested here are both reasonable and practical. The trial court's failure to employ these methods was inexcusable. The scorching publicity in this case must have had a devastating impact upon the jury's impartiality, and surely had the effect of stampeding them into a guilty verdict. Once exposed to this highly volatile publicity, no juror was capable of holding any objective views on the critical question of the defendant's guilt or innocence.

Consequently, no informed member of this Court can be other than alarmed about a jury's being exposed to this form of inflammatory publicity. For it is hard to imagine any event which more undermines the confidence and sense of security expected to be afforded by a jury in a criminal case than to have such horrifying information seared into the minds of the jury. A judicial embargo must be placed

upon the slipshod methods employed in the court below in assessing the prejudice of such a news article if a fair trial is to remain meaningful.

To perpetuate these constitutionally deficient methods through dozens and perhaps hundreds of trials which today are commonly subjected to adverse publicity will inevitably depreciate the value of a fair trial beyond measure and will vandalize this Court's historic decisions in *Sheppard* and *Marshall*. Therefore, this Court cannot sanction the methods employed here without accepting the grave implications which are bound to threaten the safety and security of these great safeguards of a democracy. For the safety of a free society and the security of the innocent alike depend critically upon an impartial jury system conducted with due regard for all the procedural safeguards sanctified in our Federal Constitution.

This case, more than any other, demonstrates the need for a judicial scouring of these precarious procedures which have become corroded both by time and misuse. The methods employed here to evaluate the effect of this adverse publicity did not comport with the barest minimum of civilized principles of justice. Faced with an unfriendly press and an aggressive prosecution, the petitioner was utterly helpless except for the countervailing protections erected by our Constitution. Unless these safeguards are preserved and kept vital, no man on trial in a highly publicized criminal case will ever be safe.

Respectfully submitted,

HERALD PRICE FAHRINGER,
JOSEPH PANZER,
Attorneys for Petitioner.

APPENDIX A

Certificate Denying Leave

State of New York
Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

ANIELLO DELLA CROCE,
Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York, New York
May 24, 19 72

Associate Judge

Irving Anolik, Esq.
225 Broadway
New York, New York 10007

Hon. Frank S. Hogan
District Attorney, New York County
155 Leonard Street
New York, New York

*Briefs returned at office

Hon. Raymond J. Cannon, Clerk
Court of Appeals

Description of Order:

8-71 Sup. Ct., New York Co., affirmed 4-20-72 App. Div. 1st

Form 36 — Order of Affirmance on Appeal from Judgment — 6-70 (C.L.)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 20, 1972.

Present—Hon. Harold A. Stevens, Presiding Justice
Owen McGivern
Arthur Markewich
George Tilzer
Samuel W. Eager, Justices

The People of the State of New York,

Respondent,

-against-

Aniello Della Croce,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment

5205

FILED APR [illegible] 1972

An appeal having been taken to this Court by the defendant-appellant

from the judgment of the Supreme Court, New York County (Grunet, J.),

rendered on September 8, 1971, convicting him of five counts of criminal contempt,

and said appeal having been argued by Mr. Irving Anolik

of counsel for the appellant, and by Mr. Michael R. Juviler

of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

Hyman W. Gamm

Clerk.

APPENDIX B

Defendant's Exhibit B for Iden.—Daily News Article, March 21, 1971, Page 3

DEFENDANT'S EXHIBIT B FOR IDEN. - DAILY NEWS ARTICLE, MARCH 21, 1971, PAGE 3 A859

Gang War Raging Over Fish Market Switch

By FRANK FASO and HENRY LEE

Historic Fulton Fish Market, now being absorbed into the Hunts Point Terminal Market in the Bronx, is expiring in a bloody convulsion of underworld homicides, high police sources disclosed yesterday. In the last five months, three murders, three disappearances and an abortive bombing ambush have been blamed on intergang warfare over controlling the rackets in the transplanted market.

Traditionally, the picturesque old Fulton Fish, way downtown on the East River, was under the dominance of the late Joseph (Socks) Lanza and later the Genovese mob, in which Socks had been a soldier. Even in the depression 1930s, the fish market rackets were worth about $20 million.

Pasquale Russo

Dominick LaMonica

Bodies fished from river

Fruit, Vegetable Control

On the other hand, the fruit and vegetable rackets, even when the markets were downtown on the lower West Side, were dominated by the Harlem mob right back to the days of the late Ciro Terranova, known as the artichoke king. Terranova, like Socks, prospered fabulously, and lived in a $52,000 home in Pelham when $52,000 was what a successful man made—maybe—in a whole decade.

But now that Fulton Fish is scheduled for merger into Hunts Points by June, the heirs and assignees of the two mobs are in head-on collision over control of mob rackets in the market as shylocking and protection.

Traditionalists, the old Genovese mob — Aniello Della Croce is the man among them to see about fish rackets — insists that Fulton remains theirs, wherever it is.

Strict geographers, the Harlem mob, formerly the fiefdom of the late Thomas (Three-Finger Brown) Luchese and now under Carmine Tramunti, argue back that the fish market is theirs, all theirs, because they control the rest of the Bronx operation.

On the basis of information gathered by detectives of Homicide South, the Old Slip Station and the Criminal Identification Division, Police Headquarters has been alerted that, as a result, a gang war is in progress.

The first known casualties were two half brothers, Dominick LaMonica, 45, and Pasquale (Patsy) Russo, 36, whose bodies were fished out of the East River under the Manhattan Bridge last Oct. 26 and 27.

Both men had been tortured, stabbed dozens of times, gagged, shot in the head with the same gun and wrapped in pink blankets. At the same time, detectives disclosed that three men close to the victims were missing.

Car Rigged With Grenades

Also in the Fulton Fish Market area, a car belonging to Joseph Maddalona, 32, described by authorities as an one-time member of the old Joey Gallo mob, was rigged with two live hand grenades on Jan. 29 on John and Water Sts. Fortunately for Maddalona and the immediate neighborhood, they were discovered before Maddalona tried to start his car.

Then only last Tuesday on Water St. between Beekman St. and Peck Slip, near the market, 42-year-old Gerald Kravitz was found dead in his cab—shot twice in the back of the head. Kravitz, owner of a Bronx fish market, was described by the police at the time as a victim of the "gangland war over the control of illegal operations in the new fish market in the Bronx."

Aniello Della Croce

Carmine Tramunti

Figure in fight for market control

Even if lives are lost, the Hunts Point prize is well worth the sacrifice, by the underworld sense of values. According to the Fresh Fruit and Vegetable Merchants Association, "millions of dollars" have been lost there through pilferage and hijackings, while market personnel have been victims of "an untold number" of robberies, rapes and muggings.

Prostitutes and dope addicts have been reported prowling along the platforms and through the buildings, and many merchants have taken to toting guns in self-protection as they transact the market's $1.5 million daily business.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-494

ANIELLO DELLA CROCE,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Preliminary Statement

This brief is in response to a petition for a writ of certiorari seeking review of a judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York, rendered on April 20, 1972. Leave to appeal to the New York Court of Appeals was denied by Associate Judge Charles D. Breitel on May 24, 1972.

Statement of the Case

Petitioner was indicted for 20 counts of criminal contempt for refusal, after receiving immunity from prosecution, to answer questions before a New York County grand jury which was investigating to determine whether there had been a conspiracy to commit the crimes of bribery, larceny by extortion, coercion, criminal usury and gambling, whether certain corporations had received the proceeds of these criminal activities, and whether the officers and directors of these corporations had conspired to steal the assets of the corporations by appropriating them to the use of other persons. The petitioner, who testified that he had been employed by Royal Crown Bottling Co. in the sales department, was convicted on five counts for refusing to answer questions bearing upon his employment and source of income, and for refusing to testify whether he had told a certain individual something. Prior to submission of the case to the jury, the trial court dismissed the other fifteen counts as repetitious.

During trial the New York *Daily News* published an article (reproduced in Appendix B to the Petition for Certiorari) entitled "Gang War Raging Over Fish Market Switch." Petitioner's photograph appeared with pictures of three other men named in the article. The article did not refer to this case or its subject matter. The next day, defense counsel asked the court to examine each juror to determine the effect of the article (489-90).* A subsequent motion for a mistrial was denied.

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* Numbers in parentheses refer to pages in the Record on Appeal to the Appellate Division of the New York Supreme Court.

Petitioner contended on appeal to the Appellate Division, as he does here, that the trial judge should have questioned the jurors privately, not examined them separately in court in the presence of the rest of the panel. Respondent argued in the Appellate Division, as we do here, that the trial court followed petitioner's suggested procedure, and that the defense never asked the court to examine the jurors privately.

ARGUMENT

There was no violation of due process when the trial court, at petitioner's request, examined the jurors individually in the jury box about a newspaper article that was published during the trial.

The sole question presented on this petition for certiorari is whether the petitioner was denied a fair trial by the manner in which the trial court interrogated the jurors about a newspaper article that referred to petitioner (see petition, p. 2). Petitioner's complaint that he was denied a fair trial by the procedure used to examine the jurors about the article is based on a misreading of the record. He asserts that defense counsel asked to have each of the jurors "privately interrogated" (petition, p. 4), and argues that the court "took over" the defense effort to determine the reactions of the jurors to the article, "and sabotaged the well-meaning efforts by defense counsel to effectively measure the extent of the damage" caused by the article (petition, p. 6). On the contrary, the trial court followed the suggestions of the defense, and defense counsel expressed satisfaction with the method chosen by the court. This is clear from a description of the colloquy.

Defense counsel asked "that each juror be examined individually and not as a body, because I feel that there may be a hesitancy on the part of some of the people on the jury to say that they read it * * *" (489-90). This was not a request to examine each juror "privately" in chambers, at the bench, or in the witness box, but a request to examine each juror individually where they were, in the jury box. When the court asked the jurors collectively whether any of them had read anything recently in connection with this case or the defendant, six jurors and two alternates raised their hands (493-9). Counsel asked, "As long as the jury is in the box, ask each individual juror, those who have read the article, about how they feel about it" (494). The court agreed. Its examination elicited strong statements that the article had nothing to do with the case and would not be considered (494-9).

Counsel then asked that the article be read to the rest of the jurors; the court declined (499-500). This request confirmed that counsel had no intention of asking the court to question the jurors individually in private, a procedure used to prevent exposure of additional jurors to the publicity. The other six jurors indicated that they had not read the article or discussed it with the jurors who had seen it (502-3).

Petitioner then moved for a mistrial because of the nature of the publicity. During his response, the prosecutor pointed out that the court had adopted the procedure suggested by counsel. Defense counsel, instead of disputing this, acknowledged, "your Honor afforded him the utmost fair trial * * *." He contended that a mistrial was required, "even though Your Honor extensively and

meticulously examined the six jurors * * *" (508). Thus, no issue of due process is presented by the procedure adopted by the court to examine the jurors about the newspaper article.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 20, 1972
New York, New York